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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR EMMANUEL HERNANDEZ,

Defendant and Appellant.

A154012

(Alameda County
Super. Ct. No. 467077)

Defendant Edgar Emmanuel Hernandez appeals from judgment after a jury convicted him of sex crimes against a victim under the age of 10. On appeal, he argues the trial court erred by: (1) granting the prosecution's motion to exclude evidence that the victim pulled down his pants, and precluding the defense from arguing this evidence impeached his mother's credibility; and (2) admitting the prosecution's expert testimony about Child Sexual Abuse Accommodation Syndrome (CSAAS). We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by amended information with committing sex crimes against a child under the age of 10 in violation of Penal Code¹ section 288.7, subdivision (b) (counts 1, 2, 3, 4, 5, and 6), and lewd acts upon a child in violation of section 288, subdivision (a) (counts 7, 8, and 9). A jury convicted defendant of all counts. The trial court sentenced defendant to a total of 90 years to life for counts 1

¹ All further statutory references are to the Penal Code unless otherwise specified.

through 6, and imposed a concurrent 18-year term for counts 7 through 9. Below is a summary of the evidence presented at trial.²

A. Mother's Testimony

In early 2014, the victim, who was born in 2009, and his mother (Mother) moved to California where they lived with Mother's adoptive parents. Later that year, Mother and the victim rented a room with a family who had a son the same age as the victim. The victim sometimes slept in Mother's room on the floor or a little bed, or he shared a room with the housemates' son. While at this residence, Mother started dating defendant. As she did with a prior boyfriend, she sometimes had sex with defendant while the victim was sleeping in the same room. Mother testified that, whenever she did this with her prior boyfriend or defendant, the lights were always off, they were under covers, and they would try to be quiet.

At some point, the victim and the housemates' son used the victim's tablet to take pictures of each other's buttocks. Mother learned what they had done and found five or six such photos on the victim's tablet. When Mother asked him about it, the victim initially denied taking the photos, but admitted it after a minute or two. Mother deleted the photos and told the victim they were inappropriate.

Mother and the housemates got into arguments regarding the victim's behavior and also about men staying the night in the same room as the victim. After a month or two, Mother left and moved back in with her parents. When asked if she left because of the victim's behavior, Mother asserted she was unsure that was the only reason, and also said she was not asked to leave.

Defendant continued to visit Mother at her parents' house, and he and Mother continued to have sex while the victim was asleep in the same room or down the hall. The victim walked in on them having sex once, but they were covered by a blanket. Mother's father asked Mother not to let defendant spend the night, which led to a verbal

² We limit our summary of the testimony to that which is relevant to the issues raised or helpful to provide context.

argument where Mother complained, in front of the victim, that her brother was bringing home his girlfriend and having sex at the home. Mother used the term “sex” without further descriptors. Weeks later, the victim got into trouble at school after he was overheard saying his uncle was having sex with his girlfriend.

In March or April 2015, defendant, Mother, and the victim moved into a garage that had been converted into a one-bedroom apartment. The victim was given the bedroom, while Mother and defendant slept in the living room. The three fell into a routine: Mother would drop the victim off at school or camp and go to work and typically come home at night around 9:30 or 10:30 p.m. Defendant would then pick up the victim and take care of him until Mother got home.

About once a week, defendant would send Mother nude photos of his erect penis via Snapchat; Mother sometimes took screenshots to save those images to her phone. Sometimes defendant was at work or at home with the victim when he sent these photos, but defendant always appeared to be alone. Mother testified the victim sometimes used her phone while she was asleep or not in the room, though she never saw the victim access her photos and he never told her he saw photos of penises.

Mother was uncomfortable with various oral sex acts defendant wanted to engage in. In August 2015, she told defendant she would perform oral sex on him, but when the time came, she fell asleep. Later, defendant was “really angry” and told Mother she would regret not doing it.

Around Thanksgiving of 2015, defendant and Mother got engaged. Then in late December 2015, while Mother and the victim were out shopping, the victim disclosed that defendant was molesting him. The victim told Mother he had something to tell her but he did not want Mother to get mad, then he disclosed defendant hurt him and made him do things he did not want to do. After this initial disclosure, the victim ran away, looking afraid. When Mother caught up to the victim, he told her that defendant made the victim touch defendant’s penis and orally copulate him, and that defendant spanked the victim until he bled and also threatened to spank him until he bled if he told Mother.

Mother immediately left the store and went home. She accosted defendant, hitting him with a broom and screaming at him. The victim, who had stayed in the car, eventually came inside, and Mother asked him more questions to ascertain if he was lying. The victim was able to accurately describe defendant's private parts as having a shaved pubic area and tiny bumps on the head of his penis. Defendant eventually left the apartment, at which point Mother called the police.

Mother testified she had been in love with defendant and did not want this to be true. The victim has never recanted, nor accused anyone of inappropriately touching him since.

B. The Victim's Testimony

The victim detailed defendant molesting him in the garage apartment, which is where all the molestation occurred. The first time, defendant told the victim a witch was in defendant's pants and a cat was in his underwear, prompting the victim to remove defendant's pants and underwear. The victim testified defendant asked him to touch defendant's penis, and he did so. After the first time, he touched defendant many more times. The victim recounted touching defendant's penis, testicles, and anus with his hands, mouth, and tongue. The victim asserted defendant would perform the same acts on him, and defendant would press his penis against the victim's buttocks. Defendant threatened to spank the victim until he bled if he told anyone, which made the victim afraid. By the time he told Mother, the victim no longer wanted to keep the secret and he wanted defendant to stop. The victim asserted he never saw pictures of defendant's penis on Mother's phone. He also did not recall defendant or any other man sleeping over when he and Mother lived with housemates, nor did he recall walking in on defendant and Mother having sex at his grandparents' home.

C. Other Testimony

The prosecution presented testimony from various other witnesses. An investigator with the District Attorney's office testified the victim described to him specific sexual encounters and sex acts the victim engaged in with defendant. A child interview specialist with the Child Abuse Listening Interviewing Coordination Center (CALICO)

testified she interviewed the victim in early January 2016, and a recording of that interview was admitted into evidence. A medical physician who was also an expert on the subject of pediatrics, child sexual assault, child sex exams, and the evaluation of children for sexual abuse testified he personally examined the victim in February 2016. The expert found no physical injuries on the victim and could offer no insight into whether or not the victim was abused.

The prosecution's other expert witness—Dr. Anthony Urquiza, a licensed psychologist and professor of pediatrics—testified on the topic of “Child Sexual Abuse Accommodation Syndrome” (CSAAS). Dr. Urquiza began by testifying that he did not know anything about the victim's case. He discussed CSAAS, characterizing it as an educational tool, not a diagnostic one, that described common characteristics of child sex abuse victims and their relationships with their abusers. Dr. Urquiza testified about CSAAS's five parts: secrecy; helplessness; entrapment and accommodation; delayed and unconvincing disclosure; and retraction or recantation. Among other things, he testified that things used to reward or coerce—such as gifting a child with electronics for doing things or threatening to spank—can induce children to maintain secrets. Further, children often feel they cannot stop sexual abuse from happening, and they accommodate or manage their feelings by suppressing emotional distress in front of the perpetrator or other family members or friends. Dr. Urquiza testified that, based on the research with which he is familiar, false allegations are rare and occur one to six percent of the time.

D. Defense Witness

The defense presented a single witness, one of the housemates (Toomi) with whom Mother and the victim lived in 2014. Toomi testified she rented a room out to Mother and the victim for a few months beginning around August 2014. At one point, Toomi confronted Mother because the victim used his tablet to take pictures of her son's buttocks and penis. Toomi testified Mother would frequently have men sleep over in the same room as the victim. When men slept over, Toomi could hear what sounded like people having sex coming from Mother's room. Mother started dating defendant one to two weeks before moving out. Mother would cover up for the victim “all the time” when

he lied, and Toomi caught him in a few lies. Eventually, Toomi asked Mother and the victim to leave for a number of reasons, including the photos the victim took of her son, and the fact that Mother kept having overnight guests in violation of the lease.

When asked by the prosecutor if she had ever seen the victim speak about sex, Toomi answered she had not heard him talk about sex but she saw him make gestures, such as pulling down his pants. After the parties rested, the prosecutor indicated Toomi's testimony about the victim pulling down his pants violated one of the court's in limine rulings. The prosecutor asked to have that portion of the testimony stricken if the jury asked for a readback of testimony and also asked that neither attorney argue it to the jury. The trial court granted the prosecutor's requests.

DISCUSSION

A. Precluding the defense from arguing to the jury that Mother's credibility was impeached

Defendant contends the trial court erroneously granted the prosecution's motion in limine to exclude evidence of the victim pulling down his pants. He claims the court erred in determining the evidence was so unduly prejudicial so as to require exclusion, and it was "significantly probative to support that . . . [M]other was lying when she denied that she and [the victim] were asked to move out of their prior residence due to [the victim's] inappropriate behaviors." Relatedly, defendant contends the court erred by prohibiting the defense from relying on Toomi's testimony about the victim pulling down his pants during argument. He claims the defense should have been allowed to rely on that evidence to impeach Mother's credibility, as she previously denied she was asked to move out of Toomi's home due to the victim's inappropriate behaviors. We reject these arguments.

1. Background

First, it is necessary to clarify what occurred leading up to this claim. The prosecutor moved to exclude as irrelevant evidence of the victim's alleged sexual conduct not involving defendant—in particular, evidence the victim took photos of his own private parts and the private parts of Toomi's son, and evidence relating to an accusation

that the victim pulled down his own pants³ and may have touched the leg of Toomi's son. The defense objected, arguing it was relevant to show the victim engaged in sexual conduct before the alleged molestations. The defense also alleged this could impeach Mother's credibility because Mother testified at the preliminary hearing that Toomi kicked her out because defendant had been sleeping over, and this would tend to show Toomi actually kicked her out because of the victim's inappropriate conduct. The court granted the prosecution's motion in limine citing to Evidence Code section 352. The court indicated the defense was already being allowed to present evidence that the victim observed his Mother's sexual conduct, which showed the victim had sexual knowledge prior to the alleged molestation. With regard to the argument the evidence could be used to show Mother lied about why she left Toomi's home, the court stated the defense could raise the point if Mother's credibility concerning why she was asked to leave Toomi's home came up at trial.

At trial, just before Mother testified, the prosecutor told the court he would ask Mother about the photos the victim allegedly took of Toomi's son, as he was concerned sanitizing the topic would make the photos seem worse than what they were. Defense counsel had no objection, and the prosecutor asked Mother about the photos.

When Toomi testified, the prosecutor asked her if she had ever heard the victim speak about sex. Toomi had not, but said she saw him pull down his pants. The prosecutor did not move to strike the testimony. After the parties rested, the prosecutor indicated Toomi's testimony about the victim pulling down his pants violated the in limine ruling, and asked to have that portion stricken "for purposes of any read back that goes to the jury" and also requested that neither attorney argue about that evidence to the jury. The defense attorney objected, but offered no specific basis for the objection. The court granted the prosecutor's request.

³ At the hearing where the trial court ruled on the motion, the prosecutor clarified the evidence at issue in the motion in limine concerned the victim pulling down his own pants, not the pants of Toomi's son.

2. Analysis

Preliminarily we observe that defense counsel's failure to offer any specific basis for the objection to the prosecutor's request to preclude a read back and argument about Toomi's testimony forfeits the claim about the propriety of that ruling on appeal. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.)

In any event, our review of both the in limine ruling and the ruling limiting argument discloses no abuse of discretion. (Evid. Code, § 352; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9; Pen. Code, § 1044; *People v. Edwards* (2013) 57 Cal.4th 658, 743.) The record confirms the jury indeed heard other evidence of the victim's pre-molestation sexual knowledge, and the court did not exceed the bounds of reason in concluding that evidence of the victim pulling his pants down (and of his other alleged "sexual conduct") would risk having "a trial within a trial." Moreover, even assuming the evidence about the victim pulling down his pants logically could have impeached Mother's testimony regarding her reasons for leaving Toomi's home, that point is, at best, a collateral issue with little probative value. (*People v. Laverne* (1971) 4 Cal.3d 735, 742–743.)

Given the record, we find no abuse of discretion.

B. Admitting expert testimony about CSAAS

California case law establishes that CSAAS evidence is admissible not to "prove that the complaining witness has in fact been sexually abused" but "to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300–1301; see *Brodit v. Cambra* (9th Cir. 2003) 350 F.3d 985, 991 ["CSAAS testimony is admissible in federal child-sexual-abuse trials, when the testimony concerns general characteristics of victims and is not used to opine that a specific child is telling the truth"].)

Here, the primary purpose of the CSAAS testimony was to educate the jury about how child victims react to sexual assault, and to dispel misconceptions about child sexual assault. Dr. Urquiza testified that he had not met the victim nor reviewed any materials

related to the case, and that CSAAS is not a diagnostic tool for determining if a child has been sexually abused, but rather an educational tool for understanding common characteristics of child sex abuse victims.

Acknowledging the admissibility of CSAAS evidence in California, defendant urges us to hold such evidence inadmissible for any purpose pursuant to the reasoning set forth in four out-of-state decisions: *Commonwealth v. Dunkle* (1992) 529 Pa. 168, *Newkirk v. Commonwealth* (Ky. 1996) 937 S.W.2d 690, *State v. Bolin* (Tenn. 1996) 922 S.W.2d 870, and *State v. Stribley* (Iowa App. 1995) 532 N.W.2d 170.

Defendant’s reliance on case law from our sister states—one of which recently passed a statute permitting expert testimony relaying “facts and opinions regarding specific types of victim responses and victim behavior” (see *Commonwealth v. Olivo* (2015) 633 Pa. 617, 619 & fn. 1)—does not persuade us to stray from our own precedent. (*People v. Ross* (2008) 162 Cal.App.4th 1184, 1190; see *Newkirk v. Commonwealth*, *supra*, 937 S.W.2d at p. 696, dis. opn. of Graves, J. [“Kentucky remains as one of the few jurisdictions that still rejects all testimony regarding the phenomenon clinically identified and demonstrated as the Child Sexual Abuse Accommodation Syndrome which provides jurors a psychological explanation for certain behavior in small children following sexual abuse. Such testimony is necessary because these children often exhibit conduct that is inconsistent with the jurors’ life experiences or understanding of human nature in children”].)

We reject this argument.

DISPOSITION

The judgment is affirmed.

Fujisaki, J.

WE CONCUR:

Siggins, P. J.

Petrou, J.

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